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No. 72-793

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

Petitioners,

v.

UNITED STATES HOUSING AUTHORITY, et al., NATIONAL TENANTS ORGANIZATION, et al.,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

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COUNTER STATEMENT OF THE CASE

A. Nature of the Case

This case involves the legality of two Department of Housing and Urban Development (HUD) Circulars which mandate that certain standards and procedures be adopted in all housing authorities with respect to their leases and the provision of grievance procedures, respectively. RHM 7465.8 requires in substance that housing authorities incorporate in leases: (1) standards of care with respect to both tenant and management; (2) remedies for management's

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egregious violations of its duties; (3) procedures for collection of monies owed, other than rent; and (4) delineation of "good cause" for eviction (R-1, pp. 90, 102).[1] RHM 7465.9 contains related procedural provisions which require that a tenant be offered an administrative hearing before an impartial hearing official or officials and be afforded an opportunity to cross-examine witnesses and fully present his case.

The housing authorities filed their complaint on July 22, 1971, alleging *inter alia* that the issuance of the above Circulars was invalid because they violated Congressional policy and the provisions of the Administrative Procedure Act (R-1, p. 1). On October 18, 1971 HUD answered and counter-claimed, alleging *inter alia* that the housing authorities' duty to comply with the terms of the Circulars and the time for the implementation thereof had run as of the date of HUD's filing (R-1, p. 10). Thereafter, Judge Denney granted tenants' motion for discretionary intervention on November 30, 1971, subject to their modifying the prayer contained in tenants' counter-claim, to conform to that of HUD (R-1, p. 202). By Order and Memorandum filed February 10, 1972, Judge Denney overruled HUD's and tenants' motions and granted plaintiffs' motion for summary judgment, declared HUD's Circulars invalid and enjoined HUD from enforcing same [A-1 through 14].[2]

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[1] "R." refers to the Record, which is contained in three volumes, the number indicates the particular volume in question.
[2] "A." refers to Petitioners' Appendix.

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The Court of Appeals for the Eighth Circuit, in an opinion filed September 28, 1972, reversed the judgments of the District Court and "remanded with directions to enter summary judgments on behalf of the defendants and intervenor parties upholding the validity of the Circulars" [A-38, 39]. On October 31, 1972, the Court of Appeals stayed its order pending the filing of the instant petition for a writ of certiorari.

Rejecting petitioners' argument that HUD's broad rule-making power was totally curtailed by the 1959 amendment to Section 1 of the United States Housing Act of 1937,[1] the Court of Appeals found that "HUD does have the ultimate supervision and authority in carrying out the provisions of the Housing Act" [A-30]. In interpreting Section 1 the Court found it "significant" that:

> . . . (1) there was not a complete transfer of authority to the local housing authorities, (2) although "administration" is not confined to budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with the National Authority to achieve uniformity in fulfilling the

[1]This section provides:

It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Act while effecting economies.

50 Stat. 888, as amended by Section 501 of the Housing Act of 1959, 73 Stat. 654, 679, 42 U.S.C. §1401.

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> objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy. When the latter occurs the real limitation to HUD's authority to act is whether its policies are reasonably related to carrying out Congress' expressed objectives to the low-rent housing program [Fn. 9 omitted] [A-31].

The Court went on to state:

> The background history leading up to the promulgation of the circulars clearly reflects a national concern as to the inequities in public housing throughout the nation. Although the Congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. [Fn. 10 omitted] [A-31, 32].

While noting that the grievance procedures (RHM 7465.9) might place a greater burden on local housing authorities, the Court held them permissible because they "do not inject HUD into day-by-day operations of the housing authority." This finding was based on two grounds: first, HUD has nothing to

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do with the detailed implementation of the grievance procedure, and second, the grievance procedure "may be invoked only when the local authority is alleged to have violated the actual terms of the lease." [A-29].

The second major issue discussed by the Court concerned HUD's obligation to comply with the notice provisions of Section 4 of the Administrative Prodcedure Act (APA).[4] Defendant and intervenors maintained that HUD Circulars are exempt from the notice provisions under Section 553(a)(2) of the APA which provides exemptions for matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

The Court below agreed. It narrowly construed the "public benefits" exemption to apply only to those regulations "directly involv[ing]" "excepted subjects" in which the government has a "proprietary or other unique interest" [A-35]. The Court found that the Annual Contributions Contract (ACC) between HUD and local authorities met both these requirements and that the HUD Circulars, as direct supplements to the ACC, were also within the exemption [A-34-36].

B. Facts

In December of 1969, the National Association of Housing and Redevelopment Officials (NAHRO), together with National Tenants Organization (NTO)

[4] 5 U.S.C. §553.

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and the National Housing and Economic Development Law Project, formed a task force at HUD's request and under its direction and supervision to develop a model lease and grievance procedure (R-1, pp. 48-49). NAHRO is the national representative of local housing authorities throughout the country. Its membership, consisting of 1,045 public housing authorities out of a total of 2,195, manage seventy-five percent of all existing public housing units (R-1, p. 49). The task force's deliberations continued for approximately one year and resulted in the issuance by HUD of the instant Circulars on February 22, 1971.

The fact that these deliberations were taking place was general knowledge in the public housing profession. The history of the negotiations was set forth in the NAHRO Information Service Bulletin that was sent to all housing authorities and individual members of NAHRO on December 21, 1970, and articles concerning the task force's progress in developing these Circulars appeared in issues of the professional housing magazine, The Journal of Housing, dated February 1970; March 1970; May-June 1970; August 1970; November 1970 and March 1971 (R-1, pp. 49, 50, 52). At the fifth meeting of the task force the final language of the grievance procedure Circular was agreed to; and at the sixth meeting, at the suggestion of the NAHRO representative, the final language for the lease was adopted (R-1, pp. 51-52).

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The agreed drafts of the Circulars were then presented to the NAHRO Housing Divisional Committee, which reviewed them section by section, and, after a few changes in language, approved them. This committee included representatives from petitioner housing authorities of the cities of Omaha, San Antonio and New Haven and the county of Contra Costa (R-1, pp. 51-52). Thereafter, the President of NAHRO advised HUD, on November 13, 1970, that the lease and grievance procedure had been ratified by the Executive Committee of NAHRO's Board of Governors. The Board of Governors includes a representative of petitioner Nashville Housing Authority as one of its members (R-1, p. 52). During this period, officials of individual petitioner housing authorities were members of the task force. For example, the Executive Directors of the housing authorities of New Haven and San Antonio took part in the meeting of November 5, 1970, at which the final agreement between NTO and NAHRO was reached (R-1, pp. 52-53).

Finally, a meeting was held on January 29, 1971 at the request of NAHRO, between Assistant Secretary for Housing Management Norman B. Watson and the Legal Issues Committee of NAHRO, at which representatives of several housing authorities including New Haven, San Antonio, Contra Costa and Kathryn M. Kuhla, General Counsel of the Chicago Housing Authority, had further occasion to make

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known their views and express their opposition to the actions of NAHRO's Executive Committee. This meeting delayed HUD's release date of the lease and grievance procedure Circulars until February 22, 1971 (R-1, p. 52). When issued it was intended that housing authorities be given a reasonable period of time to implement the Circulars and that they also be given another opportunity to make their views known with respect to them (R-1, p 54). However, after a period of over six months had elapsed, the Secretary found it necessary to determine that a reasonable time for implementation of the Circulars had elapsed (R-1, pp. 13-14, 54).

ARGUMENT

1. The Circulars Are Clearly Within the Rule-Making Power of HUD; The Court of Appeals Decision to that Effect Is in Accord with Decisions of This Court and Other Courts of Appeal and Presents No Important or Novel Question of Federal Law

This case is another in a series involving the validity of regulations issued by an administrative agency under its general rule-making power. As the Court of Appeals noted [A-32], this Court has:

> . . . repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. [cases omitted] These considerations are especially appropriate where the review is of regulations of general application adopted by an adminis-

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> trative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. *Federal Security Administrator* v. *Quaker Oats*, 318 U.S. 218, 228 (1943).

See, e.g. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Zuber* v. *Allen*, 396 U.S. 168 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

The Court of Appeals properly applied those maxims to the present case. It found that in promulgating the Circulars which recognize the rights of tenants as well as landlords, and which institute new grievance procedures designed to reduce friction and litigation, HUD was attempting to promote the objectives of the Housing Act by improving tenant-management relations and public housing environments. The Court determined that "[i]t is not unreasonable or arbitrary to expect that the new lease provisions and grievance procedures may bring about these desired goals" [A-32], and held that the Circulars were well within HUD's "ultimate authority" to "set overall policy" [A-31].

The decision below is in accord with *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969). As in *Thorpe*, the instant Circulars have been found to have a "reasonable relationship

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to the purposes for which HUD's rule-making power was authorized." 393 U.S. at 281 [A-27].

In arguing that the Circulars contravene Section 1 of the United States Housing Act of 1937,[5] petitioners attempt to turn *Thorpe* upside down, construing the case—which upheld the HUD Circular therein involved—as a holding that HUD regulations having more than a "minimal" or "insubstantial" effect upon the administration of public housing are invalid. No reading could be further from the mark. Surely if this Court had intended to prescribe a standard of "minimal effect" as the test of validity for HUD regulations affecting housing authority administration, it would not have left this intent—so drastically restrictive of the agency's regulatory authority in this area and so strikingly at odds with the tradition of judicial deference and hospitality to administration regulations—to be culled from a decision actually upholding the HUD Circular immediately before it. To the contrary, this Court in *Thorpe* plainly implied that if the regulation there involved proved ineffectual, HUD could impose a more stringent one. The *Thorpe* opinion states that "if the procedure followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing." 393 U.S. at 284, fn. 48.

[5] 50 Stat. 888, as amended by §501 of the Housing Act of 1959, 73 Stat. 679, 42 U.S.C. §1401.

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As the Court of Appeals held:

> Although the Congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. In fact, the legislative history reads to the contrary. HUD has a responsibility to police performance of its contracts so that decent, safe and sanitary character of public dwellings is maintained in accordance with the purposes of the Housing Act. See *Knox Hill Tenant Council* v. *Washington*, 448, F.2d 1045, 1048 (D.C. Cir. 1971) [A-33].[9]

Not only is the Court of Appeals decision in accord with *Thorpe* but it follows other decisions of this Court and other Courts of Appeal in cases involving substantially the same statutory scheme. See *Lewis* v. *Martin, supra; Arizona State Department of Public Welfare* v. *Department of Health, Education and Welfare*, 449 F.2d 456 (9 Cir. 1971), cert. denied, 405 U.S. 919 (1972); *Almenares* v. *Wyman*, 334 F.Supp. 512, 521 (S.D.N.Y. 1971) aff'd 453 F.2d

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[9] In addition, the Court below held premature petitioner's constitutional argument with respect to the effect of HM 7465.1 Supp. 2, citing this Court's observation in *Thorpe* that:

> We do not sit, however, "to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision." 393 U.S. at 284 (A-37).

Again based on this Court's view is *Thorpe* the Court of Appeals noted:

> The trial court did not pass on local authorities' remaining objection that HUD's promulgation of the circulars unlawfully alter the ACC contract. We find little merit to this argument. See *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. at 280 n. 35 [A-37 fn. 17].

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1075 (2 Cir. 1971) cert. denied, 405 U.S. 944 (1972); *Euresti* v. *Stenner*, 458 F.2d 1115 (10 Cir. 1972); *Serritella* v. *Engelman*, 339 F.Supp. 738 (D.N.J. 1972).

Finally, all Courts which have examined the instant Circulars have found them to be valid. Indeed, in a recent case involving identical issues as here presented, the Court of Appeals for the Seventh Circuit, on the basis of similar reasoning to that of the Court below, upheld HUD's issuance of the Circulars. *Brown* v. *The Housing Authority of the City of Milwaukee*, (7 Cir., No. 72-1259, Dec. 8, 1972) [RA-1].[7] See also *Glover* v. *Housing Authority of City of Bessemer*, 444 F.2d 158 (5 Cir. 1971); *Housing Authority of City of Milwaukee* v. *Mosby*, 192 N.W. 2d 913 (Wis. 1972); *Chicago Housing Authority* v. *Harris*, 275 N.E. 2d 353 (Ill. 1971); *Lewis* v. *Housing Authority of the City of Talledega*, No. 76-106 (N.D. Ala. May 26, 1972) [RA-11]; *McElveen* v. *Pahokee Housing Authority, Inc.*, No. 71-1727 (S.D. Fla., June 5, 1972) [RA-17]; *Lowery* v. *Housing Authority of the City of West Palm Beach*, No. 71-1956-Civ-CF (S.D. Fla., Sept. 11, 1972) [RA-20]; and *Lee* v. *Housing Authority of Elizabeth, N.J.*, 119 N.J. Super. 72, 290 A.2d 160 (N.J. Dist. Ct. 1972).

[7] "RA." refers to this Respondent's Appendix.

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2. The Court of Appeals Decision With Respect to the Exemption of the HUD Circulars from the Notice Provisions of the Administrative Procedure Act Is in Accord With Decisions of This Court and Decisions of Other Courts of Appeal; In Light of HUD Voluntary Policy of Publication Noted in the Federal Register of March 4, 1971, The Decision in Any Event Presents No Important Question of Federal Law

It should be noted at the outset that the issue of whether HUD has a duty to give notice of intent to promulgate regulations in the Federal Register in compliance with Section 4 of the Administrative Procedure Act (APA)[8] has a very limited applicability—namely only to the case at bar.[9] For on March 4, 1971, two weeks after promulgation of the instant Circulars, HUD published the following statement in the *Federal Register:*

> §10.1 Policy.
>
> It is the policy of the Department to formally promulgate its rules and regulations, to give to the public notice concerning them, and to afford, wherever practicable, to all who may be affected by them an opportunity to participate in their formulation through submission of written comments prior to their effective date.[10]

Section 10.3[11] of the published statement defined "rules and regulations" as meaning "the formally promul-

[8] 5 U.S.C. §533.
[9] In this regard, as noted earlier (supra p. 4-5), it was general knowledge in the public housing profession that a HUD Task Force was meeting to develop the instant Circulars.
[10] 24 C.F.R. §10.1 (1971).
[11] 24 C.F.R. §10.3 (1971).

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gated statements of the Department which are required to be included in the Department's Unified Issuances System in the form of Handbooks, Circulars, or Guides."

In any event, the decision below was plainly correct. The Circulars were exempt from the APA notice provisions by Section 4(a)(2) of that Act for they deal with "a matter relating to agency management or . . . to public . . . loans, grants, benefits or contracts." This Court in *Thorpe* found that HUD Circulars like these directly supplement the Annual Contributions Contract. 393 U.S. at 275. It follows that the Court of Appeals was correct in finding that the comparable instant Circulars here are exempted under §4(a)(2) of the APA [A34-36].

As this Court held in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129 (1940), and as the Court of Appeals noted:

> Government must be free from vexatious restraints which interfere with the manner in which it may dispatch its own internal affairs. To insure that the notice provisions of the APA would not be used in a similar manner to restrain the government's administration of public contracts, Congress included the exemption. See D. Reich, *Administrative Procedure Act: Analysis of its Requirement as to Rule-Making*, 33 A.B.A.J. 315, 317 (1947) [A-35].

Contrary to petitioners' contention, other decisions of Courts of Appeal are to the same effect. See

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Langevin v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2 Cir. 1971); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1247 fn. 4 (1 Cir. 1970). See also *Stroud* v. *Benson*, 155 F.Supp. 482, 490 (E.D.N.C. 1957); *Lazar* v. *Benson*, 156 F.Supp. 259, 270 (E.D. S.C. 1957); *Rodriguez* v. *Swank*, 318 F.Supp. 289 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1971).

The cases which petitioners assert to be in conflict are inapposite to the case at bar. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) involved Section 6 of the National Labor Relations Act which, unlike the governing statute here, specifically provides that the NLRB shall issue its regulations "in the manner prescribed by the Administrative Procedure Act."[11] And *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740 (3 Cir. 1969) involved exemptions under §4 (b) (A) (B) of the APA, not exemptions under §4 (a) (2).

CONCLUSION

The Court of Appeals fully considered and rejected petitioners' specific challenges to the Circulars. The Court's comprehensive and well reasoned opinion is in accord with applicable decisions of this Court as well as other Courts of Appeal decisions, and

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[11] 394 U.S. 759, 763 (1969). Section 6 provides that:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act. 29 U.S.C. §156.

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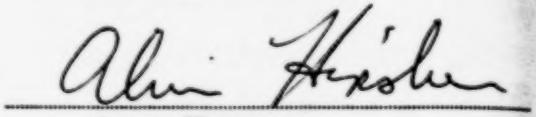
presents no federal question which requires the scrutiny of this Court.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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December 26, 1972

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Order of the U.S. District Court for the Southern District of Florida, June 5, 1972, McElveen v. Pahokee Housing Authority, Inc., et al. RA-27

Order of the U.S. District Court for the Southern District of Florida, September 11, 1972, Lowery v. The Housing Authority of the City of West Palm Beach, Florida, Inc., et al. RA-31

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In The
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1259

LOUISE BROWN, individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellees,

v.

THE HOUSING AUTHORITY OF THE CITY OF MILWAUKEE, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern Division of Wisconsin.
No. 71 C 512
MYRON L. GORDON, *Judge*

ARGUED NOVEMBER 2, 1972

DECIDED DECEMBER 8, 1972

Before KILEY and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge*, Louise Brown brought an action on her own behalf and on behalf of all tenants in federally-assisted low-rent public housing projects owned and operated by the Housing Author-

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

ity of the City of Milwaukee seeking declaratory and injunctive relief against termination of tenancies without compliance with certain required hearing procedures prior to the termination. The summary procedure used by the Authority was alleged to be in violation of circulars and regulations promulgated under the United States Housing Act of 1937 and to violate procedural guarantees secured by the due process clause of the Fourteenth Amendment of the United States Constitution. The district court granted plaintiff's motion for judgment on the pleadings, holding that the Housing Authority eviction procedure did not comply with requirements of due process and was in violation of valid regulations promulgated by the Department of Housing and Urban Development pursuant to authority given by the Housing Act of 1937. 340 F. Supp. 114 (E.D. Wis. 1972). We agree that the Housing Authority eviction procedure is invalid under lawful HUD regulations. We therefore need not decide whether the procedure used by the Milwaukee Housing Authority also violates fundamental principles of due process. *See Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 283-84 (1969).

This action was begun following the action of the Housing Authority's agent who, on August 9, 1971, served plaintiff Brown with a "Notice to Tenant Terminating Tenancy," requiring her to vacate her apartment by September 30, 1971. The notice did not contain a written statement of the reasons for

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eviction, although Brown was apparently given an oral statement, and her subsequent request for a written reason was refused by the Housing Authority.

On February 22, 1971, well before Brown's eviction notice, the Department of Housing and Urban Development, Renewal and Housing Management division, issued HUD circular RHM 7465.9. This circular requires local housing authorities receiving federal funds to adopt grievance procedures incorporating certain standards set forth in the circular. These standards had been determined following meetings of representatives of local housing authorities, tenants, professional arbitrators and other interested organizations. The stated purpose of the new regulations was to "improve management-tenant relationships and promote improved housing environment to the advantage of the low-rent public housing program thus implementing the national housing policy as expressed by Congress." In order to achieve this objective, each local housing authority was required to set up a grievance procedure in which, as a minimum, each tenant would be given an opportunity for a hearing before an impartial official or panel before the local housing authority takes any action adversely affecting a tenant's "rights, duties, welfare or status." At the hearing the tenant is to be afforded the right to present his side of the dispute, to bring in witnesses, to confront and cross-examine witnesses in appropriate circumstances, and to be represented by counsel or another person of his choice. Following

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a decision on the dispute, the parties are to be notified in writing of the decision and given the reasons and evidence relied upon in reaching the decision. The local housing authority is free to pursue its remedies following a decision in its favor and the tenant may seek appropriate relief.

The Milwaukee Housing Authority does not deny that it did not follow the procedure outlined in the circular in Brown's case or an any other case, but insists that it was not required to do so for several reasons. First, the Housing Authority insists that the circular is invalid because it exceeds the authority given HUD under the Housing Act of 1937, 50 Stat. 888, as amended, 42 U.S.C. §1401. Second, the defendant argues that RHM 7465.9 is not binding upon it because HUD failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §553(b), which provides that notice of proposed rule-making shall be published in the Federal Register. Finally, it is argued that even if the HUD circular is valid and binding, it does not require an administrative hearing prior to eviction.

I

The defendant Housing Authority's argument that HUD circular RHM 7465.9 exceeds HUD's authority under the Housing Act of 1937 is based on that part of 42 U.S.C. §1401 which states: "It is the policy of the United States to vest in the local public hous-

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ing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of . . . [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies." The Supreme Court considered this provision in *Thorpe* v. *Housing Authority of the City of Durham, supra,* determining the validity of an earlier HUD circular requiring that a tenant be told the reasons for his eviction and given an opportunity to reply, and held that the HUD circular was not inconsistent with that policy and had only a minimal effect upon the basic lease agreement between the Housing Authority and its tenants. The Housing Authority argues that this circular is distinguishable because it "goes to the root of every local Authority's relations with its tenants and constitutes a far greater encroachment upon every local Authority's power and responsibilities" than did the circular approved in *Thorpe.* We do not agree.

This circular was issued pursuant to the broad rule-making authority given HUD under 42 U.S.C. §1408, which authorizes HUD to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter." There can be no doubt that the circular in question bears a reasonable relation to this authority. Section 1401 states that it is the policy of the United States "to promote the general welfare of the Nation by

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employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . ." In *Thorpe, supra*, 393 U.S. at 281, the Supreme Court stated:

> "One of the specified purposes of the federal housing acts is to provide 'a decent home and a suitable living environment for every American family' [42 U.S.C. §1441] that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal."

Additional authority for the HUD circular is contained in 42 U.S.C. §1410(a), which provides that HUD "may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects." The Annual Contributions Contract, which defines the contractual relationship between HUD and the local housing authority, provides pursuant to this provision:

> Sec. 101: Each Project . . . will be developed and administered to promote serviceability, efficiency, economy, and to achieve the economic

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and social well-being and advancement of the tenants thereof.

• • • •

Sec. 201: The Local Authority shall at all times operate each Project 1) solely for the purpose of providing decent, safe, and sanitary dwellings . . . , 2) in such manner as to promote serviceability, efficiency, economy, and stability, and 3) in such manner as to achieve the economic and social well-being of the tenants thereof.

• • • •

Sec. 203: The Local Authority shall not permit any family to occupy a dwelling in any Project except pursuant to a written lease . . . which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause.

The HUD circular promotes the policies outlined in the federal housing act and the contributions contract in two ways. First, as the Supreme Court noted in *Thorpe, supra*, a procedure designed to protect a tenant's right to continued tenancy clearly furthers the goal of providing a decent home to Americans who lack the financial means to otherwise live in a suitable living environment. Second, the hearing procedure is reasonably related to the protection of HUD's financial contribution to the project. This relationship is noted in the background paragraph of RHM 7465.9, which states:

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> "In recent years, it has become more and more apparent that many of the problems faced by management and tenants in low-rent public housing have resulted in friction and strain in tenant-management relations and in litigation, costly to both management and tenants; much of which might have been avoided had some kind of procedure been available for grievances to be aired before an impartial individual or panel."

Others have noted the relationship between proper management and the financial success of a housing project. *See* Mulvihill, "Problems in Management of Public Housing," 35 Temp. L.Q. 163 (1962). An harmonious landlord-tenant relationship is obviously in the interests of those who have a financial stake in the success of the project.[1]

The Housing Authority's argument that the sentence in section 1401 vesting "the maximum amount of responsibility in the administration of the low-rent program" in the local housing authority precludes HUD's mandating a grievance procedure such as outlined in HUD circular RHM 7465.9 is also belied by the further clause in that sentence which subjects the local housing authority's right to establish rents and eligibility requirements to HUD's approval. That is essentially what has occurred here. HUD, in its capacity as the final authority on eligi-

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[1] 42 U.S.C. §1410(c) provides that HUD's financial contribution can vary with the financial success of the housing authority.

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bility requirements, has implemented a policy which furthers the goals of the housing act and protects its own interest in seeking to provide suitable housing for every American.

Finally, we reject the notion that the grievance procedure required by the HUD circular alters the basic lease agreement between the Authority and its tenants. The Annual Contributions Contract between HUD and the Authority requires that each local authority negotiate a written lease with its tenants "which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause." The circular challenged here merely protects the tenant's right to continued tenancy in the absence of good cause for termination of the lease.[2]

We conclude that HUD circular RHM 7465.9 is well within the broad rule-making authority vested in HUD to further the goals of the Housing Act of 1937. *Accord, Housing Authority of the City of Omaha* v. *United States Housing Authority*, Nos. 72-1102 and 72-1185 (8th Cir. September 28, 1972); *Chicago Housing Authority* v. *Harris*, 49 Ill.2d 274, 275 N.E.2d 353 (1971). *See also Glover* v. *Housing Authority of the City of Bessemer*, 444 F.2d 158 (5th

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[2]We regret the Housing Authority's argument that the circular violates the Housing Authority's rights under the due process clause of the Fifth Amendment by authorizing HUD to repudiate its obligations under the annual contributions contract, for similar reasons. *See Thorpe* v. *Housing Authority of the City of Durham*, *supra*, 393 U.S. at 278-79.

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Cir. 1971); *Housing Authority of the City of Milwaukee*, 53 Wis. 2d 275, 192 N.W.2d. 913 (1972).

II

The HUD circular challenged here was promulgated without compliance with 5 U.S.C. §553(b), the general notice provision of the Administrative Procedure Act. Plaintiff argues that compliance with this provision was not required because defendants had actual notice of the proposed regulation.[5] We need not decide this question because we agree with the United States, which filed a brief as amicus curiae, that the exception to the notice provision contained in 5 U.S.C. §553(a) is applicable here. Section 553(a) provides, in part, that:

> "This section applies . . . except to the extent that there is involved—
>
> • • • •
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts."

[5] 5 U.S.C. §553(b) requires publication of general notice of proposed rule-making in the Federal Register "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." The defendants did not deny that they had notice of the proposed circular. The procedure leading up to the standards promulgated in the HUD circular is strong evidence that the defendants did have such notice. The meetings which culminated in the grievance procedure outlined in the HUD circular began in December, 1969. At the first meeting, an "ad hoc" task force, consisting of representatives of the National Association of Housing and Redevelopment Officials (NAHRO), which is the national representative for member housing authorities across the nation, representatives of the National Tenants Organization (NTO), and others, was established to develop a model lease and grievance procedure. After each meeting of this task force, drafts were prepared by HUD and sent to NTO and NAHRO for circulation to their members for comment. It would thus appear likely that the defendant did have actual notice of the proposed rule-making.

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HUD circular RHM 7465.9 was promulgated to supplement the Annual Contributions Contract between HUD and the local housing authority. *See Thorpe* v. *Housing Authority of the City of Durham, supra*, 393 U.S. at 274-75. It is therefore specifically exempted from the notice provisions of the APA as "a matter relating to . . . contracts." *Chicago Housing Authority* v. *Harris, supra*, 275 N.E.2d at 355.

The defendant argues that the contract exemption applies only where the agency is acting in its "proprietary" capacity as an individual citizen concerned with its own property, funds or contracts. However, as the court in *Housing Authority of the City of Omaha* v. *United States Housing Authority, supra*, slip opinion at 13, stated, the Annual Contributions Contract does represent a governmental proprietary interest "in that it effectuates the government's stewardship over public housing projects which are purchased with public funds."

Two recent cases decided by the First and Second Circuits involved similar problems under Section 221 of the National Housing Act, 12 U.S.C. §1715*l*. Both courts held that the rule-making procedures of the APA did not apply because of the exception in Section 553(a) for a matter relating to agency loans, grants, benefits or contracts. *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1247 n. 4 (1st Cir. 1970).

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Inasmuch as the notice provision of the APA is inapplicable to the HUD circular, the grievance procedure contained in the circular was lawfully promulgated and is binding upon the defendant Housing Authority.

III

The Milwaukee Housing Authority argues that even if the HUD circular is valid and binding it does not require an administrative hearing. Focusing on the language of the circular which calls for a hearing before an "impartial official or a hearing panel," the Authority insists that a hearing before a state judge in an action for unlawful detainer sufficiently complies with the requirements of the circular.

This argument ignores the fact that the Wisconsin Supreme Court has itself held that the Wisconsin unlawful detainer procedure does not comply with the mandates of the HUD circular. In *Housing Authority of the City of Milwaukee* v. *Mosby*, *supra*, a tenant evicted from a housing project following a judicial hearing pursuant to the state unlawful detainer statute, Wis. Stat. Ann. §291.07, appealed on the ground, among others, that the promulgation of HUD circular RHM 7465.9 required that she be given an administrative hearing. The Wisconsin Supreme Court agreed, stating:

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> "[The circular] provides for an administrative method of advising tenants of violations and making factual determinations of whether such violations exist and whether they are of such nature as to require eviction. It also provides a means whereby a neutral person or body of persons can attempt to discuss the problems with the objective of saving the tenancy. Eviction is hardly consistent with public interest in providing housing for low income persons. . . . We conclude that the hearing requirement of the HUD circular of February 22, 1971, is valid and mandatory upon the housing authority." 192 N.W.2d at 917.

We agree with the Wisconsin Supreme Court that a state judicial action for unlawful detainer does not comply with the grievance procedure outlined in the HUD circular. *Accord, Glover* v. *Housing Authority of the City of Bessemer, supra,* 444 F.2d at 162.

IV

The final argument in this appeal relates to the propriety of a class action in this case. The district court held that the action was properly maintainable as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The defendant Housing Authority insists that a class action is not proper because not all housing projects owned and operated by the Housing Authority are federally-aided and

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the class combined tenants terminated for nonpayment of rent with tenants terminated for good cause.

The district court did not in terms limit the class to those tenants living in federally-aided low-income public housing. However, the very nature of its decision, applying the HUD circular to the tenant class, indicates that the court intended to include only tenants in federally-aided public housing. The pleadings and briefs also indicate that no relief was sought for tenants in low-income housing which does not receive federal aid.

Neither does the failure of the district court to specify whether the class included tenants terminated for nonpayment of rent defeat the class action. Although the HUD circular held binding upon the Housing Authority certainly contemplates that a hearing will be held in cases in which a tenancy is sought to be terminated on account of the nonpayment of rent,[4] plaintiff's complaint is limited to tenants whose leases may be terminated for "good cause." Complaint, paragraphs 4 and 10. Thus, although we see no reason why the class could not have been drawn to include all federally-aided public housing tenants in Milwaukee,[5] the fact that it was not does not affect the validity of the class action.

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[4]See HUD circular RHM 7465.9, appendix 1, "Model Grievance Procedure," paragraph 5(d). See also HUD circular RHM 7465.8, appendix 1, "Model Lease Form," paragraph 10, which requires a 30-day notice prior to termination for all causes, including the nonpayment of rent.

[5]*See Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 867 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

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The decision of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

EVERLINE LEWIS, et al.,
Plaintiffs;

VS.

THE HOUSING AUTHORITY OF THE CITY OF TALLADEGA, ALABAMA; et al.,
Defendants.

CIVIL ACTION No. 67-106

MEMORANDUM OF OPINION AND ORDER

If time cures ills, it also permits new problems to arise. This memorandum focuses on the proceedings in this cause after its assignment to the undersigned in August 1971. The judicial background, however, covers some five years and is briefly summarized chronologically in the appendix hereto.

On August 18, 1971, a pretrial conference was held, at which time it was agreed that there were two remaining issues for decision in the case: (1) the procedural steps taken on the eviction of tenants (*i.e.*, due process requirements), and (2) whether by its actions the defendant housing authority was maintaining segregated housing facilities. The plaintiffs were directed to tender to defendants by October 1, 1971, a detailed narrative of the facts considered by them as relevant to such issues, with provision for submission to the court of a composite

stipulation of such facts as the parties could agree upon.

In the "Plaintiffs' Statement of the Case," filed October 15, 1971, they state:

> Since the inception of this suit, it appears that defendants have taken steps to comply with HUD regulations regarding equal access regardless of race, color or creed to federally financed housing. Defendants have since 1970 actively offered vacancies in both projects under their jurisdiction to white and black applicants. While there are currently no white persons in the Knoxville Homes, there are at least two black families at the present time in the Curry Court development. Two additional projects are planned for the future and the housing director has testified on deposition that these facilities will be advertised as open to the entire community regardless of race and that they have selected a site for at least one of the projects which will insure a racial mix. It may be possible to eliminate the necessity of trial of this issue if the parties are able to agree upon a consent decree by which the defendants would agree to continue current efforts to integrate the projects and would file periodic reports with the court in that regard.

The defendants acknowledge their obligation under the Constitution and laws of the United States to operate the housing projects now existing or here-

after constructed in a racially non-discriminatory manner. They ask, however, that this obligation not be expressed in the form of an injunction, asserting that such would unnecessarily expose them to the abbreviated procedures of a contempt citation instituted by a disgruntled applicant. The court is in accord with this request, and concludes that the defendants should not be shackled with an injunction which no evidence suggests is needed. Accordingly, so far as this aspect of the case is concerned, it is the ORDER of this court, in the nature of a declaration of rights, that it is the obligation and duty of the Housing Authority of the City of Talladega, Alabama, to operate and maintain on a racially desegrated basis its housing projects and to take whatever steps as may be necessary or proper from time to time to achieve that end. In particular, future advertisements of vacancies or application procedures should clearly indicate that its housing projects are open to all applicants without regard to their race, color, creed, or national origin.

The plaintiffs also ask that the defendants be required to implement HUD Circulars 7465.6 and 7465.8. These regulations purport to require housing authorities to eliminate from, or include in, their leases certain provisions in order to remedy burdens on public housing tenants considered by HUD to be unfair. It is unnecessary to pass on the validity of these regulations in order to resolve the questions over eviction procedures. While it is true that the

original and amended complaints sought compliance with applicable governmental regulations, the thrust was directed to regulations for racially open housing. No suggestion was made at the pretrial conference in August 1971—more than six months after promulgation of the later of these two regulations—that the plaintiffs were interested in declaratory or injunctive relief regarding these regulations. The court, if not the defendants, was first apprised of any question regarding these regulations on October 15, 1971, when the plaintiffs filed their statement of the case in anticipation of a trial shortly thereafter. By that time there had already been filed in the United States District Court for Nebraska a class action challenging on behalf of all public housing authorities the viability of RHM 7465.8 and 7465.9. The Nebraska action, *Housing Authority of the City of Omaha, et al.* v. *United States Housing Authority, et al.*, has since resulted in a district court ruling approving the class action and invalidating 7465.8 and 7465.9 as mandatory requirements. The court here concludes, particularly in the light of the pendency of another case questioning 7465.8—and the viability of 7465.6 is closely related thereto—, that the plaintiffs should not be allowed to expand the issues in the present case after the pretrial conference. Accordingly, the plaintiffs' claim related to 7465.6 and 7465.8 is denied, without prejudice however to the presentation in another suit (if not in the Nebraska case now on appeal) of their purported rights thereunder.

A different question is presented as regards 7465.9, however. This is the regulation that spells out a procedure for handling grievances and tenant complaints. So far as it pertains to eviction procedures, it is clearly within the scope of the pretrial order. For such purpose it has been approved by the Fifth Circuit in *Glover* v. *Housing Authority of Bessemer*, 444 F.2d 158 (1971). It may be that the Fifth Circuit's approval came without the benefit of full briefing and argument; but until the Circuit retracts from its decision (or until a contrary position is taken by the Supreme Court, as may occur in future proceedings in the Nebraska case), this court concludes that the decision in *Glover* should be taken at face value. The past history in this case indicates moreover a need for a judicial mandate in order to protect the tenants of the Talladega Housing Authority against evictions in violation of precedural due process.

Accordingly, it is ORDERED that the Housing Authority of the City of Talladega, Alabama, and its Executive Director, and their officers, agents, servants, employees and attorneys are hereby enjoined to forthwith put into effect as relates to future evictions the procedures outlined in the Department of Housing and Urban Development Circular RHM 7465.9. This shall include a hearing before an impartial official or hearing panel (with representation of tenants on any such panel if "management" representatives are appointed); notice prior to the hear-

ing of the reasons or grounds for the proposed eviction; opportunity at such hearing to present witnesses, cross-examine adverse witnesses, and to be represented by counsel or another person of his choice; and notification in writing of the decision and the reasons therefor. The regulation indicated and this order permit the appointment of an impartial official to conduct such hearing and make such decision in lieu of a "hearing panel"; but the court declines to rule in this proceeding whether some particular person would or would not be such an "impartial official."

The court recognizes that later events, such as subsequent decisions by the Supreme Court or the Fifth Circuit Court of Appeals, may provide a basis for the defendants' seeking a modification or dissolution of this injunction. However, until such action is taken, the injunction herein provided is to continue in force.

The parties shall bear their own costs.

DONE, this the 26th day of May, 1972.

SAM C. POINTER, JR.
United States District Judge

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APPENDIX TO MEMORANDUM, Lewis et al. v. Talladega Housing Authority et al., U.S.D.C., No. Dist. Ala., No. 67-106-E.

December 1, 1964. Effective date of rule adopted by Talladega Housing Authority (THA) that birth of illegitimate child automatically causes eviction of tenant and her family.

January 23, 1967. Letters received by two plaintiffs to vacate within ten days (presumably for violation of rule against illegitimate births).

February 7, 1967. Issuance of HUD circular requiring that tenants be given reasons for proposed evictions, an informal conference, and an opportunity to reply or explain.

February 10, 1967. Complaint filed in this court challenging (1) eviction of plaintiffs, (2) validity of "illegitimacy" rule, (3) compliance with procedural due process in evictions, (4) operation of projects on a racially segregated basis, and (5) compliance with federal regulations for operation of federally funded public housing projects. TRO issued by court halting the threatened evictions.

April 17, 1967. Decision in *Thorpe* v. *Housing Authority of City of Durham*, 386 U.S. 670 (1967). The Supreme Court, taking note of (but not deciding whether it would be binding on housing authori-

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ties) HUD's February 1967 circular, implies that the procedures therein specified for evictions would satisfy due process requirements.

May 31, 1967. THA revokes prior eviction notices to the two plaintiffs.

July 14, 1967. Order of this court dismissing, without prejudice, this action for mootness. It was noted that THA stated in open court that it was complying with HUD's February 1967 circular.

August 3, 1967. Notice of appeal to Fifth Circuit. The plaintiffs complain that the "illegitimacy" rule was still "on the books" and that other aspects of their complaint had never been heard.

May 29, 1968. THA rescinds "illegitimacy" rule and adopts five standards regarding "desirability" of tenants for admission or continued occupancy.

June 26, 1968. Decision of Fifth Circuit, 397 F.2d 178, remanding case because "there remain allegations in [plaintiffs'] complaint which are entitled to be heard" and because trial court should pass on their charge that the new "desirability" standards were unconstitutionally vague.

August 19, 1968. Amended complaint attacks vagueness of "desirability" standards, compliance with procedural due process in evictions, operation

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of projects on racially segregated basis, and compliance with appropriate federal regulations.

July 7, 1970. Intervention on behalf of third tenant, claiming to have received notice of eviction for rumored misbehavior of her children but without any hearing and without being given names of "informers."

July 15, 1970. This court after hearing directs THA to readmit the intervening plaintiff as a tenant for failure to afford procedural due process in her eviction. The court suggests that THA adopt procedures for evictions including written notice of charges, and of a hearing with opportunity to produce evidence to refute the charges.

August 10, 1970. HUD promulgates RHM 7465.6, prohibiting the inclusion of certain provisions in public housing leases.

December 10, 1970. Order of this court holding the "desirability" standards not facially void for vagueness or overbreadth. The court notes that two issues remain: the due process issue in eviction proceedings and whether THA is throwing any "roadblocks" in the process of desegregating its projects.

February 22, 1971. HUD issues RHM 7465.8 and 7465.9, the first establishing criteria for provisions to be inserted in leases and the second outlining

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procedures for handling grievances and tenant complaints, including eviction procedures.

June 9, 1971. Decision in *Glover* v. *Housing Authority of Bessemer*, 444 F.2d 158 (5th Cir. 1971). The Fifth Circuit remands that case with instructions that the evicted tenant be reinstated in the project, subject to eviction proceedings held in compliance with RHM 7465.9.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROY LEE MCELVEEN, et al., *Plaintiffs*, v. PAHOKEE HOUSING AUTHORITY, INC., et al., *Defendants.*	No. 71-1727-Civ-CF ORDER

This cause came before the Court upon the Court's order for a conference with counsel, and upon defendant's motions to dismiss and for a continuance, and plaintiff's Barnes motion for a summary judgment. The Court has heard argument of counsel. A transcript of the hearing before the Court shall be prepared by the Court's Official Court Reporter, to be taxed as costs at the conclusion of this cause, and is hereby incorporated by reference into this order. Thereupon, it is

ORDERED and ADJUDGED as follows:

1. Defendant's motion to dismiss is hereby denied;

2. Defendant's motion for a continuance is hereby denied;

3. Upon stipulation of counsel for the plaintiffs, this cause shall stand dismissed as to plaintiffs Willie

Joe Lewis and Ernestine Lewis. These plaintiffs have failed to comply with the stipulation of counsel incorporated in the Court's order of December 10, 1971, in that they have not paid back rent nor have they been reinstated as tenants of the defendant Housing Authority;

4. On the basis of *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 277 (1969), this Court finds that Circulars RHM 7465.8 and 7465.9, model lease and grievance procedures, are mandatory and must be adopted by the Housing Authority;

5. Upon the basis of *Glover* v. *Housing Authority*, 444 F.2d 158 (5th Cir. 1971), this Court finds that Circulars RHM 7465.8 and 7465.9 are validly imposed upon the Housing Authority by H.U.D.;

6. The Court finds no conflict between state law and the model lease and grievance procedure in question. Florida Statute §421.21 specifically authorizes "every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the . . . operation of any housing project by such authority;"

7. The Court finds, and counsel have stipulated, that there remain no material questions of fact and this cause may be resolved upon a motion for summary judgment;

8. Plaintiff Barnes' motion for summary judgment is hereby granted;

9. Plaintiffs request that this cause be maintained as a Rule 23, Fed.R.Civ.P., class action is hereby denied; however, for all intents and purposes, the law established here will be the rule of the Court with regard to the Housing Authority's relationship with all tenants;

10. Counsel for the plaintiff shall prepare and submit for the Court's consideration a summary and final judgment form, including therein a model lease and grievance procedure which meets the mandates of Circulars RHM 7465.8 and 7465.9. Counsel may wish to confer upon this prior to submission. The Court suggests counsel utilize that lease and grievance procedure which had been agreed upon by counsel prior to the defendants' May 18, 1972, resoultion rescinding said agreement, and incorporate therein the Court's rulings and counsel's agreements about those previously unresolved points, particularly the following:

(a) The Tenants Hearing Board should be well balanced. Two tenants, two Housing Authority representatives and a fifth person to be selected by those four appears proper;

(b) The Tenants Hearing Board's decisions should be subject to judicial review, but, aside from that, the Board's decisions should be final;

(c) Interest should be paid upon a tenant's security deposit. This will be required by

Florida Law as of October 1, 1972. Ch. 72-43, Florida Laws (March 9, 1972), amending §83.261(2), Florida Statutes;

(d) Counsel for the defendant will voluntarily withdraw section 7 of the proposed lease which concerns so-called "constructive abandonment" by the tenant.

DONE and ORDERED at Miami, Florida, this 5th day of June, 1972.

CHARLES B. FULTON
Chief Judge

cc: U.S. Attorney
David M. Cherry, Esq.
Don T. Adams, Esq.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIS LOWERY, *Plaintiff*, v. THE HOUSING AUTHORITY OF THE CITY OF WEST PALM BEACH, FLORIDA, INC., et al., *Defendants.*	No. 71-1956-Civ-CF ORDER

This cause came before the Court upon plaintiff's motion for summary judgment. Plaintiffs' motion was filed on August 3, 1972. To date, the defendant Housing Authority of the City of West Palm Beach has not filed a response to plaintiff's motion; however, the United States has responded stating it does not oppose plaintiff's motion.

This civil rights cause was instituted on December 28, 1971, by the plaintiff Willis Lowery against the Housing Authority of West Palm Beach. The plaintiff Lowery is a tenant in a Housing Authority dwelling. The basis for his claim against the Housing Authority was that the Housing Authority had instituted eviction proceedings against him without notice and without first complying with certain circulars and transmittal notices sent to the Housing Authority and requiring certain criteria for terminations including notice and an administrative hearing before a hearing panel composed of two Housing

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Authority personnel, two tenants, and one other impartial person selected by the first four. The plaintiff contended that H.U.D. Circulars RHM 7465.8 and 7465.9, Model Lease and Grievance Procedure, were and are mandatory and must be implemented by the Housing Authority, and that the plaintiff's tenancy in this publicly financed and administered housing facility cannot be terminated without affording the plaintiff due process of the law by way of an administrative hearing before a hearing panel composed as stated above and in accord with Circulars RHM 7465.8 and 7465.9.

Upon plaintiff's motion for a temporary restraining order, and after this Court unsuccessfully attempted to schedule a prompt hearing where both sides could be present, this Court entered an order on January 7, 1972, granting plaintiff's motion for a temporary restraining order, restraining the defendant from evicting the plaintiff, upon the condition that the plaintiff post a bond in the amount of $65. The plaintiff posted the bond, and a hearing was scheduled for January 17, 1972.

At the January 17th hearing, defense counsel apppeared and stated he would not oppose the entry of a preliminary injunction against the Housing Authority, enjoining the eviction of the plaintiff until this cause could be completed. The Court entered an order on January 17, 1972, granting plaintiff's motion for preliminary injunction and scheduling this

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cause for final hearing on February 11, 1972. Counsel were ordered to file a stipulated statement of facts, in the way of a pre-trial stipulation, prior to the February 11th hearing.

Prior to the scheduled final hearing, counsel for the plaintiff moved the Court to join the United States of America, Department of Housing and Urban Development as a party to this cause. Because of this development, the Court postponed the February 11th final hearing to give the U.S. Attorney an opportunity to discuss the case with the appropriate government authorities to determine whether the government wished to intervene in this cause.

On March 16, 1972, the Government notified the Court that it wished to be added as a party defendant to this cause. In accord with that notice, this Court entered its order joining the United States as a party defendant and granting the Government 60 days to file responsive pleadings. The Government filed its answer and a cross-claim on May 24, 1972. This cause is presently scheduled for pre-trial on October 16, 1972, and trial on October 31, 1972.

As stated earlier, prior to the originally scheduled final hearing, counsel were ordered to file a stipulated statement of facts or pre-trial stipulation. This was done on February 4, 1972. The plaintiff and defendant Housing Authority stipulated therein to the fact that the plaintiff Lowery was a tenant in a Housing Authority in West Palm Beach, Florida,

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that a dispute arose concerning whether the plaintiff was in arrears on his rent, that eviction proceedings were instituted against Lowery, and that the defendant Housing Authority received the H.U.D. Circulars RHM 7465.8 and 7465.9 but that it has not implemented and does not employ the Model Lease and Grievance Procedure contained therein and has no plans to do so. Similarly, defendants' answer to plaintiff's compaint admits the factual allegations contained therein but denies that the H.U.D. Circulars RHM 7465.8 and 7465.9 place any mandatory requirement upon the defendant Housing Authority. The Housing Authority further claimed therein that the issuance of these circulars by H.U.D. exceeds and conflicts with the powers conferred upon H.U.D. by the U.S. Housing Act of 1937. And, in reply to the United States' cross-claim, wherein the United States alleged that these regulations or circulars are valid and effective, the defendant Housing Authority filed a general denial.

It is clear that on the basis of all the pleadings including the defendant Housing Authority's answer to the complaint and cross-claim and the pre-trial stipulation filed by plaintiff and the Housing Authority, that there remains no genuine issue of material fact, Rule 56, Fed.R.Civ.P., and that this cause may properly be disposed of upon a motion for summary judgment. The only issues which remain to be determined herein are issues of law—whether the Department of Housing and Urban Development could

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validly issue Circular RHM 7465.8 and 7465.9, Model Lease and Grievance Procedure, and whether the implementation of these by the Housing Authority is mandatory.

On June 5, 1972, in a case similar to this cause concerning the Pahokee Housing Authority, *McElveen* v. *Pahokee Housing Authority*, Case No. 71-1727-Civ-CF (S.D. Fla. 1971), this Court held that on the basis of *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 277 (1969), that Circulars RHM 7465.8 and 7465.9 are mandatory and *must* be adopted by the Housing Authorities. This Court further held that on the basis of *Glover* v. *Housing Authority*, 444 F.2d 158 (5th Cir. 1971), these Circulars are validly imposed upon the Housing Authority by H.U.D. Finally, this Court held that there existed no conflict between state law and the model lease and grievance procedure in question and that Florida Statute §421.21 specifically authorizes "every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the . . . operation of any housing project by such authority." The questions of law presented herein are identical to those in *McElveen* v. *Pahokee Housing Authority*. Thereupon, it is

ORDERED and ADJUDGED as follows:

1. By this Court's order of January 17, 1972, plaintiff's request that this cause be maintained as

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a class action in accord with Rule 23, Fed.R.Civ.P., was denied. However, for all intents and purposes, the law established here will be the rule of the Court with respect to the Housing Authority's relationship with all its tenants;

2. Plaintiffs' motion for summary judgment is hereby granted;

3. Circulars RHM 7465.8 and 7465.9 are hereby declared to be validly imposed by H.U.D. and mandatory upon the Defendant Housing Authority;

4. Counsel shall promptly meet and jointly draft a model lease and grievance procedure which meets the mandates of Circulars RHM 7465.8 and 7465.9. Counsel may wish to refer to *McElveen* v. *Pahokee Housing Authority*, Case No. 71-1727-Civ-CF, for guidance in the preparation of this lease and grievance procedure;

5. After meeting, counsel shall jointly prepare and submit to the Court within 40 days from the date of this order a proposed final judgment form along with a jointly prepared model lease and grievance procedure. The Court recognizes and hereby reserves the right of any party to appeal this cause; however, counsel shall nevertheless make the prepara-

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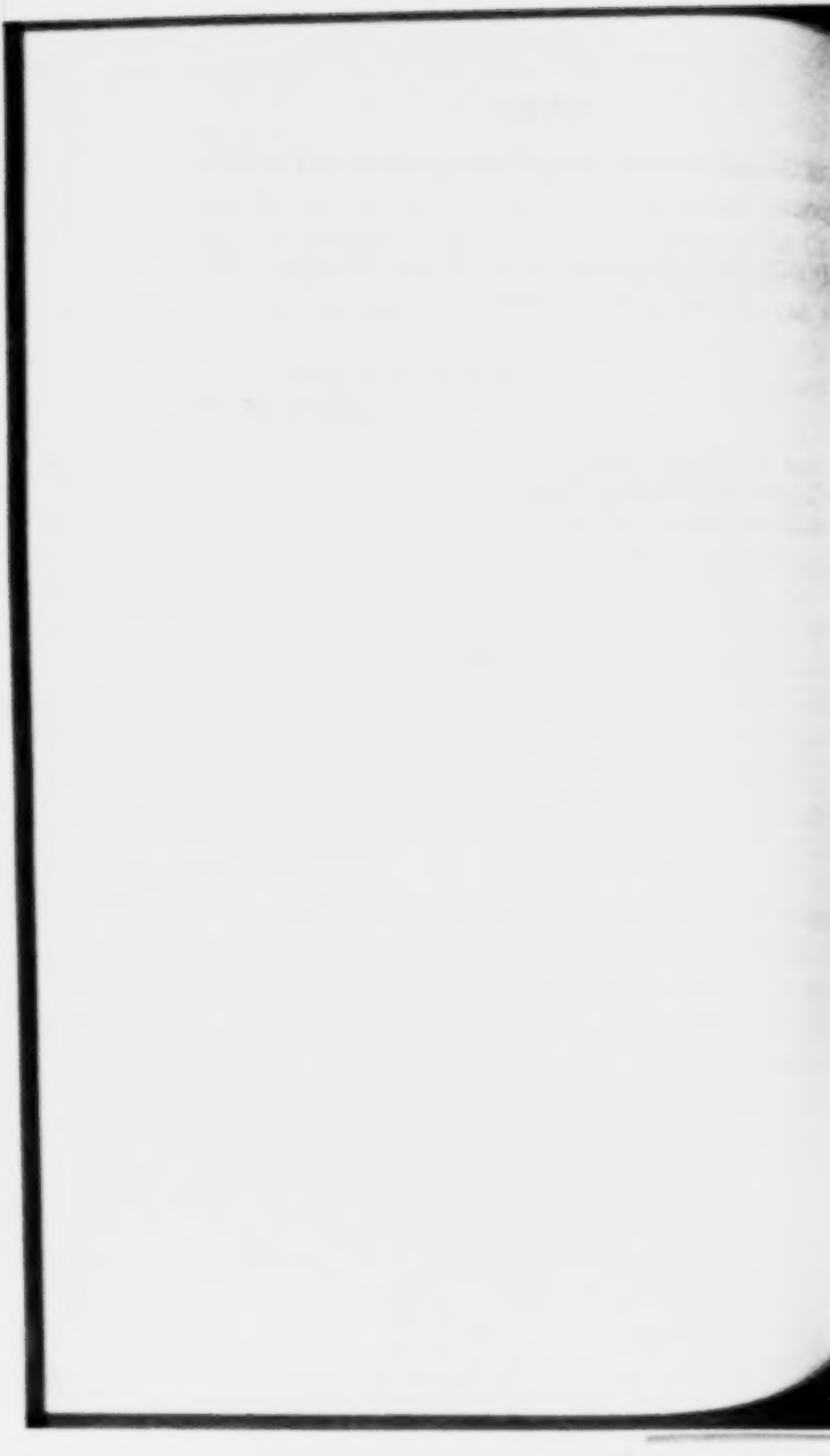
tion of the model lease and grievance procedure a joint project.

DONE and ORDERED in Miami, Florida, this 11th day of September, 1972.

CHARLES B. FULTON
Chief Judge

cc: Joel T. Daves, Esq.
Robert H. Graddy, Esq.
U.S. Attorney



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RA-39

No. 72-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,
Petitioners,

v.

UNITED STATES HOUSING AUTHORITY, et al., and

NATIONAL TENANTS ORGANIZATION, et al.,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 1973, three copies of the above Brief in Response to Petition for Writ of Certiorari were airmailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and the attorneys who appeared for the Government and The Housing Authority of the City of Omaha, Nebraska, et al., in the United States Court of Appeals for the Eighth Circuit.

Alvin Hirshen

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